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No. 94-1740

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In The

Supreme Court of the United States

October Term, 1994

PACIFIC NORTHWEST GENERATING COOPERATIVE,

Petitioner,

v.

NORTHWEST POWER PLANNING COUNCIL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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No. 94-1740

PACIFIC NORTHWEST GENERATING COOPERATIVE,

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Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented concerns interpretation of a single statutory provision that applies to one interstate compact agency and one Circuit only. Having operated under the Court of Appeals' decision on remand, that agency sees no need for this Court's review, nor does any other party of the 17 that appeared below. Moreover, the purported conflict between Circuits does not exist. This case simply does not warrant this Court's review.

STATEMENT OF THE CASE

Respondents Northwest Resource Information Center, Inc., Trout Unlimited, Oregon Natural Resources Council, Inc., Idaho Steelhead and Salmon Unlimited, and The Wilderness Society (collectively, "NRIC")[1] accept petitioner Pacific Northwest Generating Cooperative's ("PNGC") statement of the case, with the following minor corrections, clarifications, and additions.

First, PNGC asserts that the Northwest Power Planning Council ("Council") was "created by the Northwest Power Act, [16 U.S.C. § 839 *et seq.*]." Petition at 4. It is more accurate to state that the Act authorized creation of the Council as an interstate compact organization by the States of Washington, Oregon, Idaho, and Montana. *See Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power and Conservation Planning Council*, 786 F.2d 1359, 1362-63 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987). The Council definitively is not a federal agency. *Id.* at 1363. The judgment of the Court of Appeals does not raise any federalism or comity concerns by requiring the Council to show deference to the recommendations of state and tribal fish and wildlife agencies in developing its Columbia River basin fish and wildlife program.

Second, PNGC claims that it participated in the Circuit Court proceedings as an intervenor, Petition at 9, but its participation was extremely limited prior to entry of judgment by the Court of Appeals. PNGC filed a petition for review of the Council's Strategy for Salmon, but voluntarily withdrew that petition before any briefing occurred. *Id.* at 8. PNGC did not file a brief with the Court of Appeals prior to the judgment and did not participate at oral argument. It was

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[1] The NRIC respondents are all non-stock, non-profit corporations. None of the NRIC respondents have parent companies or subsidiaries, other than wholly-owned subsidiaries.

not until six weeks after the court issued its decision that PNGC first asserted its arguments in this case in a petition for rehearing and suggestion for rehearing *en banc*. The Court of Appeals denied that petition, which was almost identical to the present petition for a writ of certiorari. *See* Pet. App. C.

Third, subsequent to the judgment of the Court of Appeals, the Council adopted a new fish and wildlife program that superseded the Strategy for Salmon invalidated by the court. *See* Brief for Respondent Northwest Power Planning Council ("Council Br.") at 4. The program was developed and adopted in the course of the Council's ordinary rulemaking procedures and in light of the Court of Appeals' decision. *Id.* As part of the new program, the Council provided a detailed explanation for its treatment of recommendations from the region's fish agencies, tribes, and other entities. *See* 1994 Columbia River Basin Fish and Wildlife Program ("1994 Fish and Wildlife Program"), Chapter 15 (copy previously lodged with Clerk of the Court). As the program's findings make clear, the Council did not accept all of the recommendations of the fish agencies and tribes in promulgating the new program. *Id.*

THE PETITION SHOULD BE DENIED

I. THE QUESTION PRESENTED IS TOO NARROW TO WARRANT REVIEW.

The question presented by the petition concerns an unexceptional example of statutory construction of a single statutory provision whose geographic scope is limited to the Columbia River basin. None of the principal parties below supports the petition, including the Northwest Power Planning Council, the party directly responsible for compliance with the court's judgment. The question presented was not necessary to the Court of Appeals' judgment and does not foreclose any of PNGC's putative

rights under the Northwest Power Act. These considerations underscore the extreme narrowness of the question presented and its unworthiness for Supreme Court review.

A. *The Question Presented Concerns Interpretation Of A Single Statutory Provision With An Extremely Limited Geographic Scope.*

In its opinion, the Court of Appeals considered numerous issues of statutory interpretation under the Northwest Power Act. The court addressed the Council's duty to set biological objectives for the fish and wildlife program, to explain its rejection of program recommendations from the region's fish agencies and tribes, to provide adequate flows for anadromous fish in the Snake and Columbia Rivers, to weigh the cost-effectiveness of program measures, and to ensure an "adequate, efficient, economical, and reliable power supply" for the Pacific Northwest. *See* Pet. App. B. The court resolved some of these issues of statutory interpretation in favor of NRIC and the Yakama Indian Nation, petitioners below, and found an insufficient record to adjudicate the remaining questions. *See id.* at 30b, 42b, 45b, 52b.

PNGC asserts a single error in the Court of Appeals' manifold exercise in statutory interpretation. PNGC argues that the Court of Appeals went too far in concluding that the Northwest Power Act requires the Council and the courts "to give agencies and tribes, those charged with the responsibility for managing our fish and wildlife, a high degree of deference in the creation of a program and the interpretation of the Act's fish and wildlife provisions." Pet. App. 36b. The Court of Appeals reached this conclusion based on the language, structure, and legislative history of the Act, which uniformly emphasize Congress' intent to grant "due weight to the recommendations, expertise, and legal rights and responsibilities" of the fish agencies and tribes and

to amplify the voice of the agencies and tribes in Columbia River hydrosystem management. 16 U.S.C. § 839b(h)(7); Pet. App. 30b-36b.

Despite PNGC's best efforts to inflate its importance, the issue presented is exceedingly narrow. The Court of Appeals did not decide that the Council failed to accord proper deference to the recommendations of the fish agencies and tribes; the Council's failure to explain the reasons for its rejection of the recommendations precluded such an inquiry. Pet. App. 36b. The Court of Appeals also did not bind the Council to blind adherence to agency and tribal recommendations. To the contrary, the court recognized the existence of express statutory bases on which the Council can reject such recommendations. *Id.* at 26b. Moreover, the court found that deference is due the agencies and tribes only with respect to the fish and wildlife program and provisions of the Northwest Power Act. With respect to the power-related provisions which comprise the bulk of the Act, deference and discretion continue to reside in the Council and the federal Bonneville Power Administration. Pet. App. 31b-33b.

Not only does the question presented deal with an exceedingly narrow subject matter, but it also is limited geographically to one corner of the country. The Northwest Power Act and the Council's fish and wildlife program concern power supply and fish and wildlife resources only within the bounds of Washington, Oregon, Idaho, and western Montana, and the small portions of Nevada, Utah, and Wyoming that fall within the Columbia River basin. 16 U.S.C. § 839a(14) (definition of "Pacific Northwest"). Congress adopted the Act to address parochial Pacific Northwest concerns, and its interpretation in this case does not affect any other part of the nation.

B. *Neither The Respondent Nor The Petitioners Before The Court Of Appeals Seek Further Review Of This Case.*

No other party, of the 17 petitioners, respondent, and intervenors in the Court of Appeals, seeks further review of the question presented or any other portion of the Court of Appeals' opinion. This fact underscores the narrowness of the question presented.

The Council, which is primarily responsible for complying with the Court of Appeals' judgment, does not seek further review. Choosing instead to comply with the judgment, the Council was able to produce a new fish and wildlife program in relatively short order. *See* Council Br. at 4-5; 1994 Fish and Wildlife Program. In the Council's view, further review would serve no purpose, and the petition should be denied. *See* Council Br. at 5.

The Aluminum Company of America, *et al.* (collectively, the "Direct Service Industries" or "DSIs"), the petitioners with whom PNGC was aligned in the Court of Appeals, do not seek further review and have not supported PNGC's petition. Neither the DSIs nor the numerous other utility interests that intervened below have filed a brief supporting the petition with this Court. PNGC may believe that the judgment has oppressed the region's utilities and disrupted the proper balance between fish and hydropower in the basin, but none of the other power interests seem to have noticed.

C. *The Decision Of The Court Of Appeals Does Not Undermine The Power Provisions Of The Northwest Power Act.*

PNGC contends that the "Ninth Circuit's decision alters the delicate balance" under the Northwest Power Act between fish and wildlife on the one hand and power

interests on the other. Petition at 13. PNGC does not and cannot offer any example of how this has occurred.

Nothing in the Court of Appeals' opinion undermines the Council's responsibilities to the region's power supply or utilities. The Council remains obligated to "assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply" in its fish and wildlife program and regional power plan. 16 U.S.C. § 839b(h)(5); Pet. App. 48b. The Council remains bound to reject state and tribal recommendations that would violate this precept. *See* 16 U.S.C. § 839b(h)(7)(A) (Council may reject recommendations that would be "inconsistent with paragraph (5) of this subsection"). No one has claimed that the Council failed to satisfy this duty in promulgating the 1994 Fish and Wildlife Program on remand. *See* Council Br. at 4-5.

The Council also remains obligated to accept recommendations for the fish and wildlife program from the region's utilities and to explain the statutory bases for rejecting any such recommendations. 16 U.S.C. §§ 839b(h)(3), 839b(h)(7). Again, there has been no charge that the Council violated these duties in developing the 1994 Fish and Wildlife Program on remand.

PNGC's real complaint is that its recommendations on fish and wildlife matters are not given the same weight as the recommendations of the region's expert fish agencies and tribes. Petition at 14. However, this distinction stems from the language of the statute itself, not from the Court of Appeals' decision. Congress directed:

> The Council shall determine whether each recommendation received is consistent with the purposes of this chapter. In the event such recommendations are inconsistent with each other, the Council, in consultation with appropriate entities, shall resolve such inconsistency in the program giving due weight to the recommendations, expertise, and legal rights and

> responsibilities of the Federal and region's State fish and wildlife agencies and appropriate Indian tribes.

16 U.S.C. § 839b(h)(7).

Only by ignoring this plain language could the Court of Appeals and the Council grant equal weight to PNGC's fish and wildlife recommendations.

Based on its extensive examination of the language, structure, and legislative history of the Northwest Power Act, the Court of Appeals concluded that Congress intended a high degree of deference to the fish agencies and tribes in areas within their special expertise. Pet. App. 30a-36a. In contrast, PNGC relies almost entirely on the statements of a single member of Congress who purports to describe the backroom machinations of a shadowy "ad hoc committee" composed of Columbia River special interests. Petition at 12-13. These intrigues notwithstanding, the Court of Appeals' decision does not alter the balance between power interests and fish and wildlife in the Columbia River basin. That rebalancing was deliberately accomplished by the Act itself as part of Congress' attempt to provide "equitable treatment for [] fish and wildlife with the other purposes for which [the Columbia River] system and facilities are managed and operated." 16 U.S.C. § 839b(h)(11)(A)(i). PNGC can neither turn back the clock nor disregard the plain language of the Northwest Power Act.

D. *The Question Presented Was Not Necessary To The Judgment Of The Court Of Appeals.*

In addition to the above deficiencies, the question presented by the petition was not necessary to the judgment of the Court of Appeals. The court invalidated the Strategy for Salmon and remanded to the Council on two grounds: 1) the Council failed to explain its rejection of fish agency and tribal recommendations; and 2) the Council failed to set

sound biological objectives to guide and evaluate program measures. Pet. App. 29b, 47b, 52b. These inadequacies in the record precluded the court from assessing the Council's compliance with other substantive provisions of the Northwest Power Act, including the requirement that the Council give due weight to the recommendations of the fish agencies and tribes. *Id.* at 36b, 47b.

In remanding to the Council, the Court of Appeals stated that agency and tribal recommendations and statutory interpretations are entitled to a "high degree of deference" under the Act. *Id.* However, this conclusion was not necessary to the court's holding. The court would have remanded to the Council for development of a new fish and wildlife program regardless of this finding. Under such circumstances, this Court's review is not warranted. *See California v. Rooney*, 483 U.S. 307, 107 S.Ct. 2852, 2854 (1987) (dismissing writ of certiorari as improvidently granted; Court "reviews judgment, not statements in opinions"); *Black v. Cutter Lab.*, 351 U.S. 292, 297 (1956) (same).

In sum, the question presented challenges a straightforward, but collateral, exercise in statutory construction undertaken by the Court of Appeals as one part of its adjudication of a lengthy and complex case. The court's interpretation affects only one section of a multifold statute with a purely parochial scope. The Court of Appeals did not "depart[] from the accepted and usual course of judicial proceedings," and the question presented does not involve "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(a),(c). The petition for a writ of certiorari should be denied.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

PNGC argues that this Court should grant the writ of certiorari to resolve a conflict between the Circuits. No such conflict exists.

A. *Lawsuits Under The Disputed Provision Can Be Brought Solely In The Court Of Appeals For The Ninth Circuit.*

As explained above and acknowledged in PNGC's petition, Congress adopted the Northwest Power Act to address purely parochial concerns of power supply and fish and wildlife protection in the Columbia River basin. Pet. App. 8b-10b; Petition at 6-7. Consistent with these purposes, the Act contains a jurisdictional provision that provides,

> Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator [of the Bonneville Power Administration] or the [Northwest Power Planning] Council, or the implementation of such final actions ... *shall be filed in the United States court of appeals for the region.*

16 U.S.C. § 839f(e)(5) (emphasis added).

In other words, lawsuits concerning the statutory provision implicated by the petition can only be brought in the Court of Appeals for the Ninth Circuit. For this reason alone, PNGC's claim of a Circuit split is untenable.

B. *The Ninth Circuit Discerned No Conflict Between Its Decision In This Case And Its Earlier Decisions Under The Federal Power Act.*

Confronted with the insurmountable difficulty of creating a Circuit split over a statute that is reviewable only in one Circuit, PNGC raises the specter of inconsistency with decisions interpreting a wholly different law. Petition at 14-16. However, two of the three cases cited by PNGC to establish the putative conflict between Circuits are from the Ninth Circuit. *Id.* at 16 (citing *California v. FERC*, 966 F.2d 1541 (9th Cir. 1992), and *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (9th Cir. 1993)).

California v. FERC and *Sayles Hydro Associates* were both decided prior to this case. PNGC discussed both decisions in its unsuccessful petition for rehearing and suggestion for rehearing *en banc* to the Ninth Circuit. The Ninth Circuit saw no conflict between those decisions and the decision below. PNGC cannot construct a conflict between the Circuits based on cases from within a single Circuit.

C. *No Conflict Exists Between The Decision In This Case And Decisions Interpreting The Federal Power Act.*

PNGC also cannot manufacture a conflict between the decision below and decisions interpreting the Federal Power Act. The Northwest Power Act and the Federal Power Act differ in language and structure. Most important, there is no inconsistency among the decisions.

When interpreting the meaning of "due weight" under the Northwest Power Act, the Ninth Circuit was guided by the other provisions of the Act, the purposes of the law, and its legislative history. Among other factors, the court was impressed that the Act enumerated limited and specific bases for rejecting agency and tribal recommendations, *see* 16

U.S.C. § 839b(h)(7), and that Congress intended to empower the existing regional fish agencies and tribes rather than creating a new "superfish and wildlife entity." Pet. App. 33b, 35b (quoting 126 Cong. Rec. E10683 (1980)).

By contrast, § 10(j) of the Federal Power Act, 16 U.S.C. § 803(j), grants the Federal Energy Regulatory Commission ("FERC") far greater discretion to reject the recommendations of federal and state fish and wildlife agencies. FERC may reject recommendations that are "inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law." 16 U.S.C. § 803(j)(2)(A). In turn, the referenced subchapter covers all aspects of the development of U.S. hydropower resources and has as one of its purposes the promotion of orderly development of such resources. *See* 16 U.S.C. §§ 791a-823b. It is hardly surprising that the courts have recognized FERC's "broad authority to weigh the salient factors" under the Federal Power Act, notwithstanding the Commission's duty to consider fish agency recommendations under § 10(j). *California v. FERC*, 966 F.2d at 1550.

In similar fashion, while the Northwest Power Act requires the Council to give "due weight" to the recommendations of fish agencies and tribes in resolving conflicts with the recommendations of other parties, the "due weight" provision of the Federal Power Act speaks to resolving conflicts between fish agency recommendations and FERC's own interpretations of the Act and other applicable law. *Compare* 16 U.S.C. § 839b(h)(7) *and* 16 U.S.C. § 803(j)(2). In addition, the Federal Power Act requires only that the conditions adopted by FERC in lieu of fish agency recommendations "comply with the requirements of [§ 10(j)(1)]," 16 U.S.C. § 803(j)(2); by contrast, the Council may reject agency recommendations only if they are "less effective than the adopted recommendations," 16 U.S.C. § 839b(h)(7)(C).

The Ninth Circuit has recognized other differences between the two statutes. In reviewing the legislative history

of Federal Power Act § 10(j), the court found it significant that Congress substituted the phrase "equitable consideration" for "equitable treatment" in the language of the law. *California v. FERC*, 966 F.2d at 1550 (citing 132 Cong. Rec. S. 15107).

> "Equal consideration" is not the same as "equal treatment," and equal consideration does not dictate FERC's acceptance of the result proposed by the fish and wildlife agencies.

Id.

The Northwest Power Act, by contrast, contains an "equitable treatment" directive, 16 U.S.C. § 839b(h)(11)(A)(i), supporting the Ninth Circuit's conclusion in this case that a "high degree of deference" must be accorded fish agency recommendations under that law.

Even putting the differences between the Northwest Power Act and the Federal Power Act aside, there is no conflict between judicial interpretations of the two laws. In *National Wildlife Federation v. FERC*, 912 F.2d 1471, 1480 (D.C. Cir. 1990), and *California v. FERC*, 966 F.2d at 1550, the courts affirmed that Federal Power Act § 10(j) neither compels FERC to accept the recommendations of fish and wildlife agencies nor gives those agencies veto power over hydroproject license conditions.[2] There is no question, however, that through § 10(j), "Congress strengthened the role of the States in establishing FERC conditions." *Public Utility Dist. 1 v. Washington Dep't of Ecology*, - U.S. -, 114 S.Ct. 1900, 1921 (1994) (Thomas, J., dissenting). Section

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[2] *Sayles Hydro Associates*, the third case cited by PNGC, does not even interpret Federal Power Act § 10(j), but instead addresses the scope of federal preemption of state regulation under that Act. *See* 985 F.2d at 453. The court did not address what deference is due fish agency recommendations under the Federal Power Act.

10(j) "establishes a presumption that conditions recommended by fish and wildlife agencies should be included in a license," *California v. FERC*, 966 F.2d at 1550, and FERC bears a "heightened burden" in rejecting such recommendations, *United States Dep't of the Interior v. FERC*, 952 F.2d 538, 544 (D.C. Cir. 1992).

In this case, the Ninth Circuit required only a "high degree of deference" to the recommendations of fish agencies and tribes, not "strict acceptance" of every recommendation. *Compare* Pet App. 36b *and National Wildlife Fed. v. FERC*, 912 F.2d at 1480. The Court of Appeals' opinion gives the agencies and tribes neither paramount authority nor de facto veto power over the Council's fish and wildlife program. The courts have used different terminology in their opinions, but there is no conflict between a "high degree of deference" to recommendations under the Northwest Power Act on the one hand and "due regard," a "heightened burden" of consideration, or a "presumption of inclusion" for recommendations under Federal Power Act § 10(j) on the other. No Circuit split exists.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully Submitted,

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